In the Supreme Court of the United States

SUN LIFE AND HEALTH INSURANCE COMPANY,
Petitioner,

v.

DAVID HANNINGTON, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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REVISED QUESTIONS PRESENTED

I. Should this Court revisit its decision in *Firestone Tire and Rubber Company, et al. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989) to broaden the scope of discretion of an administrator of an ERISA plan to include interpretation of extra-plan material including questions of law?

II. Should this Court review the decision of the First Circuit even though there is no conflict among the Circuits on the questions presented?

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In *Firestone Tire and Rubber Company, et al. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989), this Court in effect decided the question presented by Petitioner. It delineated the types of powers which could properly be conferred on an administrator of an ERISA plan, Employee Retirement Income Security Act, 29 USC 1001 et seq. The power includes interpretation of terms contained in the plan with reference to other terms also contained in the plan. It also includes the right to assess the evidence in the record to determine whether a claimant is eligible for benefits. Thus, by omission of other, extra-plan powers, this Court established that the discretion of an administrator is limited to considerations of matters contained in the plan. Petitioner asks this Court to allow interpretations of law by administrators to trump interpretations of law by a court.

There is no conflict among the Circuits that courts should review *de novo* interpretations of extra-plan material by an administrator of an ERISA plan. The cases cited by Petitioner, as support for its argument that administrators should have the last word on interpretations of extra-plan material do not achieve that end. In these cases the administrators actually applied the *de novo* standard of review; the case did not involve extra-plan material or the administrator deferred a question of law.

Petitioner discredits the cases which provide for *de novo* review of an administrator's extra-plan material. In all of these cases the scope of an administrator's

discretion regarding extra-plan material is addressed directly, thoughtfully analyzed and rightly decided.

ARGUMENT

A. In *Firestone Tire and Rubber Company, et al. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989), This Court Decided the Question Presented by Petitioner

In *Firestone* this Court thoroughly delineated the permissible scope of an administrator's discretion when discretion is conferred by a plan's terms. It reiterated the rule that ERISA issues are to be resolved through the application of trust law. In trust law, the scope of the powers of a trustee are delineated in the trust instrument. Likewise, the scope of the powers of an administrator of an ERISA plan are delineated in the plan. *Id*. at 111-112.

The Firestone Court stated that a plan may give the administrator the power to "construe the plan's terms" by reference to terms contained within a plan itself and it may assess evidence in the record concerning " eligibility". *Id*. at 102. The Court does not include within its exhaustive list of powers which can be conferred on an administrator, the power to interpret extra-plan material. In fact, the *Firestone* Court explained that the determination of the permissible powers of a trustee, and therefore an administrator, is a question of law and no deference should be given to the interpretations of either party to a dispute. *Id*. at

112. Petitioner would have an administrator's interpretation of law be essentially unreviewable by a court.

B. There is No Conflict Among the Circuits on the Question Presented

1. The four Circuits which have applied the de novo standard of review are consistent with each other and are rightly decided.

First Circuit. This case required the analysis of extra-plan material, that is, the Social Security Act, the Railroad Retirement Security Act and the Veteran's Benefits Act. App 10-11. Petitioner contends that the analysis of these statutes constitutes "Plan interpretation" and therefore the arbitrary and capricious standard should apply. The Plan by its own terms, however, references extra-plan material. The First Circuit applied the universally accepted rule that extra-plan material such as questions of law are to be resolved by a Court, not an ERISA plan administrator. App. 9-10.

Second Circuit. In *Weil v. Retirement Plan Administrative Committee of the Terson Co. Inc.*, 913 F.2d 1045 (2nd Cir. 1990), the Second Circuit essentially decided the same issue presented in the First Circuit. *Id*. at 1049. *Weil* involved the interpretation of a retirement plan, specifically the question whether there had been a partial termination of the plan when the company moved and closed its divisions. If there was a partial termination of the plan, non-vested employees were entitled to plan benefits. If there was no partial termination of the Plan, non-vested employees would not be entitled to benefits.

This vesting scheme described in the Plan was designed to comport with the requirements for

favorable tax treatment by the Internal Revenue Service. The Plan itself defined "partial termination" as ('within the meaning of Section 411 of the Internal Revenue Code'.) Citing the Plan. The Administrator argued that the Court should apply the arbitrary and capricious standard of review to the Plan's finding that there had been no partial termination. The Court rejected this argument relying on *Firestone Tire and Rubber Company et al.etc .v. Bruch v et al.*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989) for the proposition that when review of a Plan's interpretation involves a question of law, in this case the Internal Revenue Code, the standard of review must be *de novo*.

Sixth Circuit. Petitioner concedes that *Daft v. Advest, Inc*. 658 F.3d 583(6th Cir. 2011) involved "determination of questions of law" and further concedes that questions of law are to be resolved by a court not an administrator and thus *de novo* review is appropriate. *Id*. at 594. To avoid the same conclusion in this case, Petitioner asserts, without justification, that "Sun Life's decision in this case did not involve the interpretation of a statute." Petition at 8. That is simply incorrect. This case did involve interpretation not of one statute but of three. App. at 11

Eight Circuit. *Riley v. Sun Life Health Insurance Co*. , 657 F.3d 739 (8th Cir. 2011), *cert. denied*, 132 S.Ct. 1870 (2012) involves facts and law which are essentially identical to this case. In both the First Circuit and Riley, there was no dispute that the claimants were disabled and entitled to benefits under the Plan. App. 4, *Riley* at 740. There was no dispute that claimants in both cases received benefits pursuant to the Veteran's Benefits Act, 38 U.S.C. 101 et seq.(VA

benefits) for service-connected disability. App. 4, *Riley* at 740.

In both cases the Courts were required to determine whether VA benefits are within a catchall provision allowing an offset for benefits which are "similar" to benefits pursuant to the United States Social Security Act and the Railroad Retirement Act. App. 12-17, *Riley* at 742 & 743. Both Courts acknowledged the well-settled rule that an administrator's decision should be reviewed under the arbitrary and capricious standard on matters involving construction of plan terms, that is, terms within the plan document itself and assess evidence in the record regarding eligibility. App. 8. Riley at 742. Both Courts decided that the *de novo* standard of review applied to material outside of the Plans including questions of law. App. 8, *Riley* at 741.

2. The Four Circuits cited by Petitioner in support of its Petition do not address the question presented or, in fact, support the conclusions of the First Circuit and other Circuits which have applied de novo review of an administrators interpretation of extra-plan documents.

Third Circuit. The *Fleisher v. Standard Ins. Co*., 670 F.3d 116 (3d. Cir. 2012) Court applied the arbitrary and capricious standard of review to the Administrator's interpretation of Plan terms by reference to terms contained within the Plan itself. It did, however, undertake a *de novo* review of a question of law which had to be resolved prior to the exercise of the Administrator's discretion.

The issue in *Fleisher* was whether the amount of benefits Fleisher received from another disability insurance policy ("North American") could be offset from the amount received from the policy at issue ("Standard"). The Standard policy allowed an offset for benefits received from another "group" disability policy. *Id.* at 119. The Administrator considered whether the North American policy was a "group" policy. Fleisher argued that the arbitrary and capricious standard should not apply to the Administrator's interpretation of material outside of the plan. The Court rejected this argument and held that the arbitrary and capricious standard of review should be applied to both an administrator's interpretation of plan terms and to its findings of fact even if the interpretations and findings involved consideration of material outside of the plan, that is, the North American policy *Id*. at 121.

Superficially this decision seems to be at odds with this case. The First Circuit plainly stated that the arbitrary and capricious standard should not apply when an administrator is called on to review extra-plan material. App. 8. The First Circuit held that in such a case a court must review the decision of an administrator *de novo*. *Id.*

The Fleisher Court's statement concerning the application of the arbitrary and capricious standard is not as broad as it seems. The Court stated that the determination whether a plan term is ambiguous presents a question of law. *Id*. at 121. It then undertakes a legal analysis of whether the plan term at issue is ambiguous. It goes to great lengths to show that the relevant plan term in the North American policy, the extra-plan material, is ambiguous, *Fleisher*

790 F.3d at 122-23, 125-28, thereby triggering the power of the administrator to decide the meaning of the term. Thus, an administrator may have discretion to interpret plan terms even though ambiguous but a finding of ambiguity in the first place is a question of law and as such should be reviewed *de novo*.

In any case, if this Court grants the Petition for Certiorari, it will not serve to resolve a conflict among the Circuits even if there is such a conflict. This is so because the *Fleisher* case involved an interpretation of extra-plan material which was a document. In this case, the First Circuit relied on *Coffin v. Bowater*, 501 F.3d 80(1st. Cir. 2007) and held that all extra-plan material, both documentary as well as law should be reviewed *de novo*. App. at 9. This Court actually decided, however, only a question of law. There was no documentary evidence at stake.

Fourth Circuit. The Fourth Circuit is not in conflict with the First Circuit and other Circuits which have applied *de novo* review of an administrator's interpretation of extra-plan material . *Carden v. Aetna Life Insurance Company*, 559 F.3d 256(4th Cir. 2009) involved a straight-forward interpretation of plan terms only and not the consideration of any extra-plan material either documentary or law.

In the *Carden* case, the claimant was receiving disability benefits pursuant to a policy of disability insurance. The Plan provided for an offset for "other income" including income received from worker's compensation. *Id*. at 258. The disability which claimant suffered and for which it was paid benefits under the Plan, was different from the disability claimant

suffered for which it was paid worker's compensation benefits. Claimant argued that there should be no offset for worker's compensation benefits because the disabilities were different. *Id.* The issue was resolved by analysis of the Plan terms only: "the…issue to be resolved is whether [Aetna] under the specific language of the plan documents…" is entitled to the offset and "the case turned entirely on the proper interpretation of the Plan language…"*Id.* at 559. Furthermore the *Carden* Court apparently had no intention of overruling its decision in *Johannssen v. Dist.No.1—Pac. Coast Dist,. MEBA Pens. Plan,* 292 F.3d 159, 169 (4th Cir. 2002)('legal questions are appropriate terrain for the courts, not plan administrators, and when eligibility determinations turn on questions of law we have not hesitated to apply a *de novo* standard of review')(citing First Circuit App. 10).

Fifth Circuit. In *High v. Systems Inc.,* 459 F.3d 573 (5th Cir. 2006) the Court, by implication, limited the discretion of an administrator to "determine eligibility for benefits and to construe terms" of a plan. *Id*. at 577. It did not include in its summary of the scope of an administrator's discretion the discretion to interpret extra-plan material.

The *High* case is superficially similar to this case in that it involved an offset of Veteran's Administration benefits as "other income" and upheld the Administrator's decision to take the offset. *Id.* at 582. The *High* Court, however, did not engage in an analysis whether Veteran's Administration benefits should be offset because the benefits involve "similar" law as did the First Circuit. The issue in the *High* case was very

different. The *High* Court only considered whether the facts precluded the administrator from taking the offset under the principles of estoppel or waiver. *Id*. at 579-582.

Seventh Circuit. *Frye v. Thompson Steel Company, Inc*., 657 F.3d 488(7th Cir. 2011) is not at all controversial. It is a plain application of the universally accepted rule that the decision of an administrator is to be afforded discretion when the decision involves an assessment of the "quality and quantity of evidence" or "…whether the evidence can be characterized as fulfilling a particular requirement of the plan." *Id*. at

493. There is no mention that the administrator's interpretation of extra-plan material should be given any deference whatsoever.

In *Frye*, the Company offset the amount of worker's compensation benefits from the pension benefits the claimant received from the Company by postponing payments of benefits for 10 years and 2 months, the amount of time it would take for the company to recoup the amount of the worker's compensation benefits.

The issue in *Frye* was whether the interpretation of the term "disability" , propounded by the Company, resulted in a conflict between two provisions of the Plan both of which include the term "disability." *Id*. at
491. The Court applied the well-established rule that when the administrator of a plan is given the discretion, to interpret plan terms, terms contained within the plan, the arbitrary and capricious standard of review should apply. In the end, because this case turned on the calculation of the amount of worker's compensation pursuant to statute, extra-plan material,

the Administrator deferred entirely to the calculation of the Illinois Worker's Compensation Commission. *Id*. at 490.

CONCLUSION

Based on the foregoing, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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